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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

-v-

MARK DUNLOP

Applicant

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Ms G McCullough (instructed by the Public Prosecution Service) for the Prosecution
Mr T McDonald KC with Mr D McKeown (instructed by Begley & Co Solicitors) for the Applicant

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Before: Keegan LCJ, McFarland J and Humphreys J

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MCFARLAND J (*delivering the judgment of the court*)

Introduction

[1] This is a renewed application for leave to appeal against an extended custodial sentence of nine years with an extension period of three years imposed upon the applicant following his conviction by a jury of a number of violent offences against his former partner. A restraining order was also imposed but it is not the subject of the appeal. Leave to appeal was refused by the single judge Mr Justice Kinney.

The offending

[2] The offending involved four incidents between June 2019 and April 2020. The applicant was born in 1985 and the victim in 1987. They were living together as an unmarried couple from late 2018.

[3] **Incident 1**: In June 2019 the victim was in the kitchen of the home. The applicant had come home from work and had drink taken. During an argument the applicant punched the victim to the face, dragged her by the hair, whilst holding her hair he punched her again to the face and when she was on the ground kicked her underneath her chin when wearing work boots. He then proceeded to bang her

head against cupboards and the tiled floor. This had occurred during the evening and the victim remembered regaining consciousness in the morning when she was still in the kitchen. During the assault the victim was bleeding from both ears and from a scalp wound.

[4] The victim wanted to attend hospital and the applicant said that he would watch over her. During the following days, and when she eventually did attend hospital ten days later, the applicant told her to lie to her family and to the medical staff as to how she came about her injuries.

[5] She suffered lacerations to the head, loss of hair, severe bruising including two black eyes and a fractured jaw (Count 1 – grievous bodily harm with intent)

[6] **Incident 2**: In December 2019 the victim was sitting on a stool in the dining room. The applicant shouted at her "shut your f***ing mouth or I will shut it for you" and then proceeded to punch the victim on her mouth knocking her off the stool causing a laceration to her lip (Count 2 – common assault). Count 3 on the indictment related to criminal damage to the stool but the applicant was acquitted of this charge by the jury.

[7] **Incident 3**: In February 2020 the applicant demanded that the victim remove her sister as a friend on Facebook, and when she tried to leave the room, he attacked her by punching her to the face on multiple occasions. He attempted to kick her when she fell but the furniture prevented any contact. The victim sustained significant bruising to the face, and an x-ray taken over a year later confirmed an undisplaced facture of the eye socket (Count 4 - assault occasioning actual bodily harm). During the incident the applicant threw the victim's mobile telephone to the ground and damaged it (Count 8 – criminal damage). In the aftermath of the incident threats were made to kill the victim, her father and her mother (Counts 5 – 7 – threats to kill).

[8] **Incident 4**: The final incident was in April 2020 when the applicant and the victim were celebrating the news that the victim was pregnant. The applicant made abusive comments concerning the victim's family, blamed the victim for the Covid-19 pandemic and blamed the victim as he was unable to see his children from other relationships. He brought his clenched fist within inches of the victim's face causing her to fear that she would be struck (Count 9 – common assault).

The police investigation and the criminal proceedings

[9] The April 2020 incident resulted in a complaint to the police concerning all four incidents. The applicant was arrested and interviewed on two occasions, and during both he gave what could be described as 'no comment' interviews. He was returned for trial and pleaded not guilty to all counts on 19 January 2021.

[10] His defence statement denied his involvement in any of the crimes, primarily accusing the victim and her family of telling lies and stating that he did not know how the victim came about her injuries.

[11] After a four day trial at Newry Crown Court before His Honour Judge Kerr KC ("the judge") the applicant was convicted on 30 June 2022 of all counts, save for count 3 (criminal damage to a stool in December 2019), by unanimous verdicts of the jury.

[12] A written submission on sentencing issues was prepared by the prosecution, and the judge also received a pre-sentence report from the Probation Board for Northern Ireland ("PBNI") and a victim impact statement from the victim. Sentencing hearings were conducted on 6 September 2022 when the judge received oral submissions from both the prosecution and the defence, and he then passed sentence on 13 September 2022.

The victim impact and pre-sentence reports

[13] The victim provided a statement after the trial which ran to five pages. She referred to the physical injuries and how the fractured jaw still restricts her ability to open her mouth fully and when chewing. She has a loss of feeling in her upper lip and a permanent scar above her left eye. She continues to reside in the same home and finds it difficult to enter the rooms in which she had been assaulted.

[14] The pre-sentence report was provided on 1 September 2022. The applicant was known to the PBNI as he had served a custody probation order (30 months custody 18 months' probation) in 2008. He complied with the components of the order. This information was supplemented by two interviews via video-link with the applicant, contact with the prison where he was held on remand, contact with the Southern Health and Social Care Trust, and access to the case papers.

[15] The report sets out the personal circumstances of the applicant, a man of 36 years with five children by four different partners. The youngest child was 13 weeks old. He was a self-employed spray-painter having had various jobs since leaving school at 15 without qualifications.

[16] The applicant maintained his innocence when interviewed by the probation officer again repeating that all of the allegations were false. The applicant's criminal record (see below) was also referred to.

[17] It was noted that the applicant's offending patterns had become more violent and aggressive as he progressed through adulthood and that his aggression occurred across different settings with behaviours being unpredictable. The applicant minimised his behaviour.

[18] Using the assessment, case management and evaluation ("ACE") assessment tool it was considered that the applicant presented a high likelihood of reoffending in the next two years. There was a specific assessment indicating that there was a high risk of the applicant committing further offences against a partner.

[19] In a section of the report entitled *Risk of serious harm to the public* the author highlighted the seriousness of the index offending, the escalating behaviour, the significant levels of denial and the blaming of others, coupled with evidence of the applicant's ability to cause harm both physically and psychologically. The author concluded that the applicant "is not assessed as meeting PBNI's criteria posing significant risk of serious harm to the public at this stage." It was proposed that after sentencing that a risk strategy meeting would be convened. The report also recommended that the court should consider the making of a violent offences prevention order ("VOPO").

The applicant's criminal record

[20] The applicant had 27 previous convictions including crimes of violence and dishonesty. Of particular relevance are the following:

(a) Common assault committed in May 2005 for which he received a two month sentence suspended for two years at Craigavon Magistrates' Court in August 2007.

(b) A common assault and two assaults on police committed in May 2007 and November 2006 for which he received a five month sentence at Craigavon Magistrates' Court in April 2008 which was varied on appeal at Craigavon County Court in May 2008 by being suspended for three years.

(c) Section 20 wounding committed in April 2007 for which he received the custody probation order (see [14] above) at Craigavon Crown Court in November 2008.

(d) Common assault committed in September 2015 for which he received a three month sentence at Craigavon Magistrates' Court in January 2017, which was varied on appeal at Craigavon County Court in March 2017 by being suspended for three years.

(e) Assault occasioning actual bodily harm committed in August 2016 for which he received a six month sentence suspended for three years at Craigavon Magistrates' Court in January 2019.

[21] During the trial there had been an application to adduce the above convictions as bad character evidence and a brief summary of the offending was provided to the judge. The common assault conviction at (b) was perpetrated against his then partner in a domestic setting.

[22] The suspended sentence imposed in March 2017 was still operative at the time of the first three incidents and the suspended sentence imposed in January 2019 was still operative at the time of all four of the incidents that we are concerned with.

The sentencing hearings

[23] The first hearing was convened on 6 September 2022. The judge had received a written submission from the prosecution. As this appeal has focussed on the consideration of dangerousness, we will refer briefly as to how this was dealt with by the parties and by the judge.

[24] The prosecution did highlight that the offences of grievous bodily harm, assault occasioning actual bodily harm and making threats to kill required an assessment of dangerousness. Apart from that, the written submission made no specific reference to that assessment and focussed more on general sentencing issues such as aggravating and mitigating factors together with guideline cases. During her oral submissions, Ms McCullough, on behalf of the prosecution, stated:

> "The Probation have concluded that this defendant is not … dangerous in terms of the legislation… While I'm not instructed to make any particular contrary submissions, I would like to point out that this is entirely a matter for your Honour."

At that stage the judge expressed certain reservations about the pre-sentence report's conclusion, and Ms McCullough added:

> "Your Honour has picked up entirely on my concerns."

We understand that Ms McCullough was expressing her own views at this stage, as opposed to those of the Public Prosecution Service.

[25] The judge then said to Mr McDonald KC "Now … obviously that has been to some extent sprung on you, do you wish time to consider?" to which he replied, "Not so much." Mr McDonald KC then made some submissions on the issue of dangerousness.

[26] The hearing on 6 September 2022 was concluded with the judge stating:

> "I am very grateful for what you have said Mr McDonald. Obviously, as is apparent from the earlier discussions there was between counsel, all counsel and myself, I had a query in my mind about the issue of dangerousness in this case. I'd now like to reflect on the submissions that have been made because it is an important decision one

way or the other and accordingly, I intend to pass sentence in this case on Tuesday morning."

[27] The final sentencing hearing did not take place until 13 September 2022 (the Wednesday). In the interim, neither party sought to adjourn the matter further or to make any additional submissions.

The sentencing remarks

[28] On 13 September 2022, the judge sentenced the applicant to an extended custodial sentence of nine years custodial term with a three year extension period. This applied to count 1 with lesser concurrent sentences imposed for the other offences (extended custodial sentences with three year custodial terms and three year extension periods for the assault occasioning actual bodily harm and for the threats to kill, fifteen month determinate custodial sentences for the common assaults, and twelve month determinate custodial sentence for the criminal damage). No issue is taken with the use of concurrent sentences.

[29] After setting out the factual background, the judge dealt with the applicant's criminal record and the victim impact statement. He referred to the various guideline authorities including *R v McAuley and Seaward* [2010] NICA 36 on assaults with the use of a weapon such as a shod foot, and *R v Hughes* [2022] NICA 12 and *R v Allen* [2020] NICA 25 on assaults in a domestic setting. He also referred to the pre-sentence report. The aggravating factors were identified as the domestic nature of the repeated violence perpetrated in the victim's own home. The first incident involved kicking the victim to the head and lifting her head and banging it against a hard object. The applicant refused to obtain medical assistance when requested. He threatened to expose intimate images of the victim should she report the incidents. The judge identified no mitigating factors.

[30] After considering these factors and applying the guideline cases, the judge determined that the appropriate commensurate term should be one of nine years.

[31] The judge then dealt with the issue of dangerousness. He referred to the relevant authorities of *R v EB* [2010] NICA 40 and *R v Owens* [2011] NICA 48 and reminded himself of the need to take into account all of the information before him. That information included the applicant's use of violence in the past, the serious harm caused in the first count, the assessed high risk of reoffending generally and specifically in relation to violence during the course of an intimate relationship. All this is coupled with the applicant's refusal to accept responsibility for his conduct and his distorted thinking in relation to his behaviour. The judge expressed his concern about the escalation of the applicant's conduct.

[32] Based on all of this evidence, the judge determined that the applicant was dangerous as there was a significant risk of serious harm to members of the public, particularly the applicant's domestic partners. He then went through the statutory

process of eliminating a life sentence and an indeterminate custodial sentence as inappropriate and imposed the extended custodial sentence with a nine year custodial term and a three year extension period. The judge then made a restraining order but declined to make a VOPO as he did not consider one to be necessary given the nature and length of the sentence.

The grounds of appeal

[33] The applicant's appeal is based on two grounds. The first is that the judge erred by concluding that the dangerousness threshold had been met in that he placed insufficient weight on both "the Crown and PBNI's assessment that the applicant did not meet the criteria for dangerousness." Reference is also made to the judge erring in failing to recognise that the threshold for dangerousness is a higher threshold than it is for the imposition of a VOPO.

[34] The second ground is that the length of the sentence was not commensurate with the facts of the case or the applicant's record.

Discussion

[35] The first point to make is that the applicant is incorrect with regard to the prosecution approach to the issue of dangerousness. At no stage did the prosecution ever state that the applicant did not meet the criteria for dangerousness. It was neutral on the issue and made no submission on the matter.

[36] The approach to assessment of dangerousness is set out in Article 15(2) of the Criminal Justice (NI) Order 2008 –

> "The court in making the assessment … —
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> (a) shall take into account all such information as is available to it about the nature and circumstances of the offence;
>
> (b) may take into account any information which is before it about any pattern of behaviour of which the offence forms part; and
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> (c) may take into account any information about the offender which is before it."

[37] Guidance as to how this is to be applied has been set out by this court in *R v EB* largely following the decision of *R v Lang* [2005] EWCA Crim 2864 which dealt with identical provisions in the English legislation. Morgan LCJ in *R v EB* also gave further guidance as to the relevance of pre-sentence reports at [10] and [11]:

> "[10] … There is considerable emphasis on the role of the pre-sentence report, and we will have a little to say about that later in this judgment.
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> [11] The importance of the pre-sentence report was also recognised in *R v Pluck* [2007] 1 Cr App R (S) 43. In *Pluck*, the appellant had been sentenced to imprisonment for public protection with a specified period of four years. The probation officer had assessed the appellant as not posing an immediate or likely risk of harm to others. The Judge disagreed and found the appellant did pose a significant risk of serious harm. The Court of Appeal held;
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> > '…in evaluating the risk of further offences, the reports before the court will probably constitute a key source of information, although the assessments set out therein are clearly not binding. However, if a court is minded to proceed on a different basis than the conclusions set out in the reports, counsel should be warned in advance.'"

[38] More recently this court in *R v Sangermano* [2022] NICA 62 at [49]–[57] under a section in its judgment entitled *Dangerousness: The Legal Rules* revisited and reaffirmed the principles in *R v EB*. McCloskey LJ at [55] stated:

> " … This court has further emphasised in, for example, *R v Kelly* [2015] NICA 29 that the sentencing court should take account of every item of information bearing on the predictive evaluative judgment to be formed. Inexhaustively, factors to be taken into account include the nature and circumstances of the index offence, the history and circumstances of previous offending, any ascertainable pattern of offending, the offender's attitude, any indications of a capacity to change and any positive indications emerging from the offender's pre-sentencing incarceration."

[39] This court also adopts the comments of Judge LJ in *R v Johnson* [2006] EWCA Crim 2486 at [11] (approved by Thomas LCJ in *R v Roberts* [2016] EWCA Crim 71) that the appellate court should be slow to interfere with the conclusions on any assessment of dangerousness reached by a sentencer who has accurately identified the relevant principles and applied his mind to the relevant facts.

[40] Two issues are raised by the applicant's first ground of appeal – whether the correct procedures were applied, and second whether there had been a proper evaluation. The judge was clearly concerned about the assessment as set out in the pre-sentence report. He identified the issues with counsel as shown by the exchanges with both Ms McCullough and Mr McDonald KC on 6 September 2022. He asked Mr McDonald KC if he wanted time to consider the issue and this was declined. Even at the conclusion of that hearing he adjourned the matter for further reflection which provided both parties, and particularly the defence, an opportunity to deal with the issue either by way of further evidence or submissions. We are satisfied that the judge followed the correct procedure, and that the applicant was given sufficient notice of the issue in line with the guidance in *R v Pluck* and *R v EB*.

[41] The applicant also makes reference to a suggestion that the judge equated the dangerousness test to the test for the making of a VOPO. We understand that this relates to the following statement by the judge on 6 September 2022 when referring to the pre-sentence report:

> "And the final matter of course, is that they endorse an application for a Violent Offender's Prevention Order and that has the same test, as far as I am aware, has the same test as a Sexual Offences Prevention Order in that they could only be putting it forward on the basis that they are telling the court that it was necessary which rather seems to contradict their finding that he isn't dangerous."

[42] On any reading of this statement it is clear that the judge was equating the VOPO test to the Sexual Offences Prevention Order ("SOPO") test and not to the assessment of dangerousness test. The VOPO and SOPO tests are identical and to make these orders a court must be satisfied that they are necessary for the purpose of protecting the public from the risk of serious violent or sexual harm caused by an offender. The VOPO/SOPO and dangerousness tests do contain similar language, but they are different tests. All that the judge was saying was that he had difficulty in reconciling the pre-sentence report advocating for a VOPO on the basis that it was necessary to protect the public from the risk of serious violent harm yet still was of the opinion that the applicant did not himself pose a significant risk to the public of serious harm.

[43] It is not necessary for us to dwell on this point at length, but Judge LJ has set out in *R v Richards* [2005] EWCA Crim 2159 how the statutory regimes for dangerousness and for SOPOs are different. At [27] he stated:

> "In our judgment, these schemes were intended to be and are distinct. Therefore it is not a pre-condition to the making of a sexual offences prevention order that the judge should be satisfied that the offender would also qualify for an extended sentence (or for that matter, a

> sentence of life imprisonment or imprisonment for public protection), or that he should regard himself as deprived of necessary jurisdiction if they do not. That presupposes that the risk of re-offending must either be sufficient for the purposes of the dangerousness provisions in the Criminal Justice Act, or, if it is not, that it should be ignored. In short, although there may well be cases in which the potential overlap between the two sentencing regimes will require close attention, the ambit of the court's broad discretion to make a sexual offences prevention order is prescribed by the provisions which created it, without reference to section 224-229 of the Criminal Justice Act."

We consider that the judge had correctly identified that this case was one that required close attention. He did find that there was a risk of serious harm but that given the nature and length of the sentence he had imposed, he did not consider a VOPO to be necessary.

[44] We are also satisfied that the judge had identified the relevant legal principles and applied his mind to the relevant facts. He has made no error of principle. As Morgan LCJ stated in *R v EB* the assessment by probation officers is undertaken using their own case management tools and it does not follow the evaluation method that is required by the 2008 Order. We agree with the factors identified by the judge (see [31] above). The applicant has a significant history of violence, his behaviour is escalating, and people with whom he has intimate relationships are vulnerable to being attacked. It is very difficult to even go beyond the incident in June 2019. At that time in his life the applicant had suspended sentences for crimes of violence hanging over him (after what can only be described as generous sentencing at Craigavon Magistrates' and County Courts) and he undertook a vicious attack on his partner, dragging her by the hair, kicking her on the ground with his feet shod in work boots and then banging her head off the kitchen cupboards. He then delayed her receiving medical treatment for her injuries which included a broken jaw, and then forced her to lie about the cause of the injuries. The total absence of remorse coupled with a victim-blaming attitude renders any realistic prospect of rehabilitation as impossible at this stage.

[45] It is clear to us that the judge considered this matter carefully. Counsel were also permitted to make submissions and Mr McDonald availed of this opportunity. There was no procedural unfairness as was first intimated at the directions stage of this appeal. The judge also reserved his decision which is an indicator as to the thought he applied to the evaluative exercise he had to undertake. Having considered the judge's reasoning we fully endorse his evaluation and have no hesitation in rejecting this ground of appeal.

[46] The second ground related to the length of the sentence and in particular the nine year custodial term. In his oral submission, Mr McDonald KC did not press this ground, however, we will deal with it as follows. Under Article 14(5) of the 2008 Order the judge was required to impose an "appropriate custodial term" and a further period (the extension period) during which the applicant would be subject to a licence for "such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences." Article 7 of the 2008 Order defines the appropriate custodial term as being a sentence which "in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it."

[47] Again, the judge correctly identified the guideline cases, and in our view was entitled to conclude that the aggravating factors relating to all of the offending and to the applicant, justified a custodial term of nine years. In a not dissimilar case, again involving serious domestic violence with a weapon, this court approved a starting point of nine years before a plea (see *R v Mongan* [2015] NICA 65).

[48] In addition, we can see no issue with the length of the three year extension period. This court in *R v Cambridge* [2015] NICA 4 allowed an appeal against an indeterminate custodial sentence and in substituting an extended custodial sentence was required to conduct the sentencing exercise of imposing both the custodial term and the extension period. At [45]–[50] Gillen LJ considered the purpose, and length, of the extension period. Certain extracts from that judgment are pertinent to our consideration of the length of the extension period imposed in this case:

> "[46] The extended period will be for such period as is considered necessary to protect the public from serious harm. The protective element should not be fixed as a percentage increase of the commensurate sentence. On the contrary, the protective element should be geared specifically to meet the statutory objective i.e. the protection of the public from serious harm and to secure the rehabilitation of the offender to prevent his further offending. The punishment element cannot dictate the period required to ensure the necessary level of protection. The two aspects of sentence thus serve different purposes. The first is to punish and the second is to protect. See Valentine "Criminal Procedure in Northern Ireland" 2nd Ed at 18.64, *R v McColgan* [2007] NIJB 254 at paragraph [24] and *R v Cornelius* [2002] Cr. App. R.(S)69 at paragraph [10].
>
> [47] …

> [48] It is pertinent to observe that whilst the statutory provisions do not expressly advert to the concept of proportionality between the sentence passed and the gravity of the offence, nonetheless Parliament has imposed a restriction on the length of the protective element that can be imposed. Parliament cannot have intended that the Order be used to pass sentences that are wholly disproportionate to the nature of the offending. However, whilst proportionality has to be observed, strict proportionality between the length of the extension period and the seriousness of the offence will always be secondary to the main purpose of the provision which is protection of the public. See similar expressions of view on similar statutory provisions by Kerr LCJ in McColgan's case at [27] in the context of the Criminal Justice (Northern Ireland) Order 1996 and Mackay J in Cornelius' case at paragraph [10] in the context of s.85 of the Powers of Criminal Courts (Sentencing) Act 2000.
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> [49] …
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> [50] Turning to the length of the extension period, we observe that no specific recommendation of time is contained in any of the material before us. However, given the proximity of the instant offences to the earlier opportunities afforded by courts for him to reform which he has spurned, the significant escalation in the pattern of offending revealed in the present offences and his period of non-compliance with the prison regime and failure to avail of help whilst there, he clearly presents as someone with an inability to learn from past mistakes and a high likelihood of re-offending. Such an offender requires lengthy medical assistance and supervision if the public is to be adequately protected. For those reasons we consider that an extended period of 3 years is not only a proportionate response but is consistent with the principle of totality in this instance. The extended custodial sentence therefore shall be 10 years in custody with an extended period of 3 years."

[49] The approach adopted by the judge accords fully with the principles set out by Gillen LJ in *R v Cambridge* and was to our mind proportionate to the offending at issue and necessary for the purpose of protecting the public from serious harm.

Conclusion

[50] Overall, we consider that the grounds of appeal are especially weak in the circumstances of this case. This was a case of serious and escalating domestic violence by someone with a track record of violence (including violence towards a previous partner) who has shown no remorse and who is plainly a significant risk to the public, particularly women. Such offending clearly merited the sentence imposed. In the circumstances, we reject both grounds of appeal. The applicant's renewed application for leave to appeal is therefore refused.